

**STATE OF NEW JERSEY
GOVERNMENT RECORDS COUNCIL**

Final Decision

KENNETH M. SERRANO
Complainant

GRC Complaint No. 2002-33

v.
SOUTH BRUNSWICK TOWNSHIP
Custodian of Record.

Decision Issued: January 17, 2003
Decision Effective: January 31, 2003

At its January 17, 2003 public meeting, the Government Records Council considered Complaint #2002-33 filed pursuant to the Open Public Records Act (OPRA), N.J.S.A. 47:1A-1 et seq., against the Township Clerk. The Complaint challenged the Township's denial of access to: 1) an audiotape of a telephone call to 911 on July 16, 2002 by Michael Janicki of Dayton, N.J., 2) the Police reports regarding that call, and 3) Emergency Medical Service (EMS) records concerning the call. Subsequent to the filing of the OPRA request with the Township, custody of the 911 audiotape was transferred to the Middlesex County Prosecutor's Office for use in an investigation that has resulted in Mr. Janicki's indictment for murder.

The Council considered the Requester's complaint, the Custodian's Statement of Information, and multiple submissions from counsel for the Custodian, the counsel for the Requester, the Middlesex County Prosecutor's Office, the Executive Director's Amended Findings and Recommendations dated January 7, 2003, the Executive Director's Supplement thereto dated January 17, 2003, the County Prosecutor's January 13, 2003 motion for a Protective Order made to Frederick DeVesa, P.J.Cr, opposition to the motion from Requester's counsel dated January 14, 2003, a letter to Judge DeVesa from the Executive Director dated January 14, 2003, Judge DeVesa's Order of January 16, 2003 denying the prosecutor's motion, and a transcript of Judge DeVesa's oral opinion dated January 16, 2003.

The Council having decided by affirmative vote of three Council members at its January 17, 2003 meeting to adopt the attached Amended Findings and Recommendations of the Executive Director dated January 7, 2003 along with the Supplement thereto dated January 17, 2003, the Council herewith:

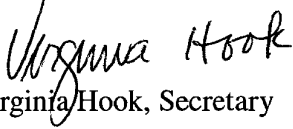
- Dismisses the portion of the Complaint seeking access to Police reports and EMS reports regarding a 911 telephone call on July 16, 2002 by Michael Janicki; and,
- Finds that the audiotape of the telephone call to 911 on July 16, 2002 by Michael Janicki is a government record to which the requester shall be provided access; and,
- Directs the Prosecutor, who has physical possession of the audiotape, to provide the Township Clerk with "sufficient access" to the audiotape to allow the Township Clerk to fulfill the request for access to the audiotape.

A copy of this Decision shall be provided to all participants in this matter: the requester, the Township, the Middlesex County Prosecutor's office and all other counsel of record as well as Michael Janicki's attorney. Any application for a stay of this Decision must be filed with the Council by the effective date of this Decision, January 31, 2003.



VINCENT MALTESE, Chair
Government Records Council

I attest the foregoing is a true and accurate record of the Government Records Council:



Virginia Hook, Secretary
Government Records Council

Dated: January 17, 2003

**STATE OF NEW JERSEY
GOVERNMENT RECORDS COUNCIL**

**Amended Finding and Recommendation of Executive Director
January 13, 2003
and
Supplement to Amended Finding and Recommendation of Executive Director
January 17, 2003**

**Amended Finding and Recommendation of Executive Director
January 13, 2003**

KENNETH M. SERRANO

Complainant

GRC Complaint No. 2002-33

v.

SOUTH BRUNSWICK TOWNSHIP

Custodian of Record.

Records Requested: Police and EMS reports regarding 911 call on July 16, 2002 by Michael Janicki, Dayton, N.J. and audiotape of 911 call.

Request made: July 23, 2002

Custodian Receiving Request: Barbara Gut, Municipal Clerk

Request denied: July 24, 2002

GRC Complaint filed: August 29, 2002

Current Custodian of 911 tape: Middlesex County Prosecutor's Office

Executive Director's Recommendation

Upon consideration of comments received from requester's legal counsel, the Middlesex County Prosecutor's Office and the Custodian's legal counsel concerning the Executive Director's December 6, 2002 Findings and Recommendations, the Executive Director concludes that:

- **Police reports meet the definition of** "criminal investigatory records" and are, as such, confidential pursuant to N.J.S.A. 47:1A-1.1;
- The **Emergency Medical Service records** in this case are not government records because they were prepared by a voluntary, non-profit emergency medical service that is not a "public agency" subject to OPRA; and
- The Custodian should provide the requester a copy of the **911 tape** because 911 tapes are government records required to be kept pursuant to N.J.A.C. 17:24-2.4 and, pursuant to N.J.S.A. 47:1A-3(a), this tape was "open for public inspection, examination or copying" before the Prosecutor or the Police commenced investigation in this matter.

The Executive Director recommends that the Council make its Final Decision effective several days after signature to provide the Custodian and the Prosecutor time to consider the decision and to seek any remedy provided by New Jersey law and Court rule including, but not limited to, a Protective Order pursuant to R. 3:13-3(f) barring release of the 911 tape.

Statement of Facts

On or about July 23, 2002, Kenneth Serrano, a reporter for the Home News Tribune, submitted an OPRA request to the South Brunswick Township Police Department seeking “all police and EMS reports regarding an 11:15 p.m. 911 call and response to call” on July 16, 2002 and “audio tape of 911 call” made by Michael Janicki, who has since been indicted in connection with his father’s death.

On or about July 24, 2002, Municipal Clerk Barbara Gut advised Mr. Serrano in writing that the records would not be provided due to “pending investigation as per Assistant County Prosecutor William Lamb.”

Mr. Serrano filed a Complaint with the GRC on August 29, 2002. In a Statement of Information received by the GRC October 31, 2002, the custodian stated “[t]hese records were not released due to a criminal investigation in progress as per Assistant County Prosecutor William Lamb. By July 25, 2002 all records were seized by the Middlesex County Prosecutors office and were no longer in the Township’s custody.”

In response to the Executive Director’s Preliminary Findings, communications were received from the Middlesex County Prosecutor and the Township of South Brunswick. In a letter dated December 4, 2002, the Prosecutor advised that the 911 telephone call made by Michael Janicki which is the subject of the complaint, is “inappropriate to release” pursuant to N.J.S.A. 47:1A-3(b) because the content of the call pertains to a defense of insanity/ diminished capacity being raised by Mr. Janicki at his upcoming trial. As a result the Prosecutor argues that release of the tape would compromise the parties’ ability to obtain impartial jurors.

The Prosecutor also stated that Rule of Professional Conduct 3.6, regulating statements by lawyers, prohibited the Prosecutor from revealing the content of the tape. The Prosecutor’s office provided Mr. Janicki’s attorney, William Fetky, Esq., a copy of the December 4 letter arguing against release of the 911 tape. As of the date of this Finding, the GRC has received no comment from Mr. Fetky.

In its separate submission, the Township’s attorney observed that the Township Custodian no longer possessed the 911 tape but relied, nevertheless, upon on the County Prosecutor’s arguments in defense of the OPRA Complaint against it.

On December 6, 2002, the Executive Director provided the parties with a copy of Findings and Recommendations that the **911 tape** was **not** publicly accessible because the Prosecutor had provided sufficient evidence for the Council to conclude that release of the tape would be “inappropriate” pursuant to N.J.S.A. 47:1A-3(b).

The Executive Director also found that the **Emergency Medical Service records** were not government records under OPRA because they were prepared by a voluntary, non-profit emergency medical service that is not a public agency under OPRA, and that the **police reports** were confidential “criminal investigatory records” under N.J.S.A. 47:1A-1.1. The parties were given four business days to comment on the findings.

The day before the Council was scheduled to consider this Complaint, the requester’s counsel, Thomas Cafferty, Esq., submitted comments on the December 6, 2002 Findings. While Mr. Cafferty agrees that the police reports are confidential, that the emergency medical service records in this case are not government records, and that 911 tapes are government records required to be

kept pursuant to N.J.A.C. 17:24-2.4, he disagrees with the Executive Director's finding that it is "appropriate" to withhold the 911 tape under N.J.S.A. 47:1A-3(b).

Mr. Cafferty argued that N.J.S.A. 47:1A-3(b) regulates access to "information" pertaining to criminal activity and prosecutions, *not* government records such as 911 tapes; that N.J.S.A. 47:1A-3(a) governs access to records pertaining to an investigation in progress by "any" public agency, including the County Prosecutor; and that the Council should order the current Custodian of the 911 tape to provide a copy of the tape to the requester pursuant to N.J.S.A. 47:1A-3(a) because the 911 tape was "open for public inspection, examination or copying" before the County Prosecutor or the Township Police commenced an investigation.

The matter was removed from the Council's December 12, 2002 Meeting Agenda to allow GRC staff and counsel an opportunity to consider these comments.

On January 8, 2003, the Executive Director proposed amendments to his Findings and Recommendations with respect to the 911 tapes, concluding that the tapes were "government records" pursuant to N.J.A.C. 17:24-2.4 which were open to public inspection, examining or copying before the Prosecutor or the Police commenced investigation in this matter and that, as a result, the tapes were publicly accessible pursuant to N.J.S.A. 47:1A-3(a). The Executive Director's Findings concerning police reports and EMS records set forth December 6 were reiterated.

Responding to the amended Findings and Recommendations in an e-mail dated January 10, 2003, Township Counsel Donald Sears contended that:

1. Because the 911 tapes "triggered or were a key part of" the investigation by police in this matter, the tapes were not accessible to the public "before the investigation commenced" and would not be accessible today for the reasons set forth in the Prosecutor's December 4th letter;
2. That N.J.S.A. 47:1A-3(b) was the relevant subsection because it spoke of "examining" information, a term applicable to items such as 911 tapes; and,
3. That any GRC order to release the tape would place the Township in the "impossible position" of disobeying a "directive" from the County Prosecutor's office not to release the tape.

In a letter dated January 13, 2003, the County Prosecutor argued that N.J.S.A. 47:1A-3(b) governed access to the 911 tape and that release of the tape continued to be inappropriate for the reasons set forth in his December 4th letter. Further, the Prosecutor observed that inspections of records must occur "during regular business hours" under OPRA. Because the 911 call was made at 11:15 p.m. and police investigation commenced at approximately 2:25 a.m., the 911 tape was never "open for inspection" at government offices *before* the investigation commenced and, thus, would not be publicly accessible under the "proviso" of N.J.S.A. 47:1A-3(a). The prosecutor also advised that he has applied to the criminal court for a protective order on a "semi-emergent" basis. The motion is returnable before the Honorable Frederick DeVesa, P.J., Criminal Division, on January 15, 2003. In light of this application, the prosecutor requests that the Council remove this matter from the agenda for January.

Relevant OPRA Provisions

Under N.J.S.A. 47:1A-6, the custodian has the burden of proving that any denial of access to a government record is lawful.

N.J.S.A. 47:1A-1.1, in relevant part, defines a “government record” as one being made, kept, maintained or received by

any officer, commission, agency or authority of the State or of any political subdivision thereof, including subordinate boards thereof, or that has been received in the course of his or its official business by any such officer, commission, agency, or authority of the State or of any political subdivision thereof, including subordinate boards thereof.

N.J.S.A. 47:1A-1.1 also states in relevant part that “a government record shall not include the following information which is deemed to be confidential: ...criminal investigatory records.”

“Criminal investigatory record” is defined at N.J.S.A. 47:1A-1.1 as “a record which is **not** required by law to be made, maintained or kept on file that is held by a law enforcement agency which pertains to any criminal investigation or related civil enforcement proceeding” in N.J.S.A. 47:1A-1.1.” (Emphasis added)

N.J.S.A. 47:1A-3(b) regulates access to information concerning a criminal investigation (e.g., type of crime, weapon, name of victim, time and place of arrest, etc.) The requester is not seeking information of this nature but, as discussed below, is seeking access to a record, the content of which is not known. N.J.S.A. 47:1A-3(a), on the other hand, regulates access to records pertaining to an investigation by “any” public agency.

N.J.S.A. 47:1A-1.1 includes “law enforcement agencies” as a subset of “public agency.” N.J.S.A. 47:1A-3(a) provides:

Notwithstanding the provisions of [OPRA], where it shall appear that the record or records which are sought to be inspected, copied, or examined shall pertain to an investigation in progress by any public agency, the right of access provided for in [OPRA] may be denied if the inspection, copying or examination of such record or records shall be inimical to the public interest; **provided, however**, that this provision shall not be construed to allow any public agency to prohibit access to a record of that agency that was open for public inspection, examination, or copying before the investigation commenced. [bracketed material supplied for brevity; emphasis supplied].

Section 3(a) also addresses cases in which custody of a record changes and provides guidance regarding the Township attorney’s observation that the Township no longer possesses the tape:

Whenever a public agency, during the course of an investigation, obtains from another public agency a government record that was open for public inspection, examination or copying before the investigation commenced, the investigating agency shall provide the other agency with sufficient access to the record to allow the other agency to comply with requests made pursuant to [OPRA]. [N.J.S.A. 47:1A-3(a)].

Background Information

About 911 Tapes

As explained below, the 911 “tape” in this case is clearly a government record under OPRA. . This is because 911 tapes are recordings of telephone calls made to a specific telephone number (“911”) reserved for emergency use by state law. The 911 system is a communication network that links various call-answering centers called public safety answering points (PSAPs). Each PSAP is:

- Run by a government agency to receive calls and dispatch or forward requests for law enforcement, fire fighting, emergency medical services, or other emergency services to a public safety agency that provides the requested services.
- Connected to a “logging recorder” that electronically records all voice communications and transactions on the 911 network at the PSAP and time/date stamps all 911 calls on a continuous 24-hour basis.
- Required to maintain recordings produced by the logging recorder and all documents or records related to 911 calls in a secured area for no less than 31 days. [N.J.S.A. 52:17C-8 et seq.; N.J.A.C. 17:24-2.4.]

The Asbury Park Decision

As a point of information, the Executive Director notes Asbury Park Press v. Lakewood Township Police Department, 354 N.J.Super. 146 (Law.Div.2002) in which a trial court considered a request under a section of the Right To Know Law repealed by OPRA by a newspaper reporter seeking a copy of a 911 tape held by the Lakewood Township Police Department pertaining to a police car chase.

The court held that the 911 tape was disclosable under the Right to Know law, common law and, in the Court’s opinion, Section 3a of OPRA (had it been in effect at the time) because most 911 tapes are made before any investigation is in progress. In doing so, the court emphasized that the decision was based strictly on the facts of that case. The Appellate Division Clerk’s office advises that there has been no appeal filed from this decision. .

Analysis and Conclusion

1) With respect to the request for a copy of the police reports, N.J.S.A. 47:1A-1.1 states in relevant part that “a government record shall not include the following information which is deemed to be confidential: ...criminal investigatory records.” “Criminal investigatory record” is defined as “a record which is *not* required by law to be made, maintained or kept on file that is held by a law enforcement agency which pertains to any criminal investigation or related civil enforcement proceeding.” Because a written police investigation is not legally required to be made, maintained or kept on file, the Executive Director recommends that the Council find that the reports of the South Brunswick Police Department sought in this case are “criminal investigatory records” under N.J.S.A. 47:1A-1.1 and, thus, not subject to disclosure.

2) With respect to the Emergency Medical Services reports, the Township’s attorney advises that a private, non-profit service was dispatched in response to the 911 call and created the medical report sought in this complaint. No party contests the truth of this statement. The Executive Director recommends that the Council find that such private providers are not public agencies under OPRA

and that the emergency medical service record generated in this instance is not a government record under N.J.S.A. 47:1A-1.1.

3) As shown above, because this 911 tape and all documents or records related to it were required to be maintained by a PSAP in a secured area for no less than 31 days, it is clear that the 911 tape is a “government record” under N.J.S.A. 47:1A-1.1. It then follows that the 911 tape is not “a criminal investigatory record” deemed confidential under OPRA because N.J.S.A. 47:1A-1.1 defines a “criminal investigatory record” as “a record which is *not* required by law to be made, maintained or kept on file...”

The Prosecutor concedes that the police investigation in this matter commenced *after* the 911 call was made and became a record maintained by the local PSAP. However, with respect to whether the 911 tape was “open” for public inspection before the investigation commenced, the prosecutor argues that government records created after official business hours are not publicly-accessible records until government offices open at 8:30 a.m.

Under this theory, government records created after “regular” business hours such as 911 tapes, planning and zoning board decisions, or municipal court proceedings, for example are either confidential under OPRA or do not “become” public records until government offices open the following day. In short, whether a record is publicly accessible in this case will depend upon the vagaries of the 911 call— if 911 calls occur during normal business hours, they will be “open for inspection” under N.J.S.A. 47:1A-3(a) prior to an investigation commencing. 911 calls made during weekends will be accessible under N.J.S.A. 47:1A-3(a) depending on which occurs first: the police investigation or the opening of government offices.

OPRA defines “government records” as those made, maintained, kept on file or received in the course of official business by any officer, commission, agency or authority of the State. OPRA does not classify records as accessible or confidential based upon the time they were created. Indeed, many parts of government, such as police departments, PSAPs, and other agencies are either open 24 hours or receive information via computer on a 24-hour basis. The Prosecutor’s interpretation of OPRA would make some 911 calls confidential based solely on the fact they were made after normal business hours. The resulting arbitrary access to an otherwise public record like 911 tapes is inconsistent with both the intent and language of OPRA.

Barring action by the Court, the Executive Director recommends that the Council order the Custodian to provide the requester access to the 911 tape, but make the Council’s Final Decision effective at least 30 days afterwards, to allow the trial Court time to decide the Prosecutor’s motion.

Other Issues raised by the County Prosecutor (12/04/02)

The County Prosecutor’s claim that RPC 3.6 prohibits release of the 911 tape appears inapplicable. Neither the Township Custodian nor the County Prosecutor is being asked to make a statement, only to release a government record in their custody.

The Prosecutor’s assertions that release of the tape would compromise the parties’ ability to secure an unbiased, impartial jury to decide the charges against Janicki and otherwise jeopardize the right to a fair trial are not relevant to determining access under N.J.S.A. 47:1A-3(a) to a record such as the 911 tape that was publicly accessible prior to commencement of the County Prosecutor’s investigation. Such concerns must be addressed to the appropriate criminal trial judge.

The Legislature very clearly set forth in N.J.S.A. 47:1A-3(a) its policy that records publicly accessible prior to commencement of an investigation by “any” public agency, should remain publicly accessible after commencement of the investigation. The Legislature also specified that the portion of Section 3a permitting withholding of records if copying would be “inimical to the public interest” cannot be construed to prohibit access to records of that agency that were publicly accessible prior to commencement of an investigation.

Taken together, none of arguments of the custodian or the Prosecutor provide the Council any basis to classify the 911 tape as confidential under OPRA. The 911 tape in this case was a government record of the Township of South Brunswick accessible to the public under OPRA at the time it was created and, thus, remains so even after commencement of any investigation.

The definition of “government records” at N.J.S.A. 47:1A-1.1 provides an exclusion from access for “information that is to be kept confidential pursuant to court order.” Should the prosecutor obtain a Protective Order from the trial court barring release of all or part of the 911 tape pursuant to R. 3:13-3(f) or any other applicable rule or law, the 911 tape would be considered confidential under OPRA.

Issues raised by the Township (1/10/03)

The Township offers no rebuttal to the Director’s conclusion that 911 tapes are government records open to inspection pursuant to the statutes or regulations governing 911 tapes, and, instead, argues that the police investigation commenced the second the call was made to 911 and that, as a result, the tape is “part of” an investigation and should not be released for the reasons in the Prosecutor’s December 4th letter.

The Township is essentially asking the Executive Director to render confidential any record that is “part of” a criminal investigation, an interpretation that renders the “proviso” language in N.J.S.A. 47:1A-3(a) meaningless. Further, 911 tapes are clearly government records being used by a public agency in an investigation under N.J.S.A. 47:1A-3(a), not specific information pertaining to a crime of the sort described in N.J.S.A. 47:1A-3(b).

The Township has no reason to be concerned about the integrity of its police investigation in this matter. “Criminal investigatory records” such as police investigation reports containing police assessment of facts found in records of all sorts, is confidential under OPRA. Thus, the public has no way of knowing which particular publicly accessible record is of significance to the police, thereby preserving the integrity of police investigations.

Concerns such as the effect of the tape contents on potential jurors should be brought to the attention the criminal court judge in charge of the case as part of a request for a protective order.

The Township will not be placed in an “impossible position” of “disobeying” the County Prosecutor if the GRC issues a Final Decision ordering access to the 911 tape. While, the tape is currently in the possession of the Prosecutor it is the Prosecutor’s obligation to provide the Township with “sufficient access” to the tape to allow the Township to comply with the OPRA request (N.J.S.A. 47:1A-3(a), last sentence).

The Council would take into consideration any good faith action by the Township and any failure to act on the part of the Prosecutor’s office in assessing the Township Custodian’s actions in this case. OPRA makes it clear that any public official, officer or employee who knowingly and willfully violates OPRA and unreasonably denies access “under the totality of the circumstances” can be held responsible, not just a custodian. N.J.S.A. 47:1A-11.

For these reasons, the Executive Director recommends that the Council find that the 911 tape sought in this matter is a government record under OPRA and order the Township Custodian to provide a copy of the tape to the requester. However, the Executive Director strongly recommends that the Council make the Final Decision effective 30 days after execution in order to allow the Trial Court time to consider the Prosecutor's pending motion and issue a ruling on same.

A handwritten signature in dark ink, appearing to read "Marc H. Pfeiffer", is written over a horizontal line.

Marc H. Pfeiffer, Acting Executive Director
Government Records Council

Dated: January 13, 2003

**STATE OF NEW JERSEY
GOVERNMENT RECORDS COUNCIL**

**Supplement to Amended Finding and Recommendation of Executive Director
January 17, 2003**

KENNETH M. SERRANO

Complainant

GRC Complaint No. 2002-33

v.

SOUTH BRUNSWICK TOWNSHIP

Custodian of Record.

Records Requested: Police and EMS reports regarding 911 call on July 16, 2002 by Michael Janicki, Dayton, N.J. and audiotape of 911 call.

Request made: July 23, 2002

Custodian Receiving Request: Barbara Gut, Municipal Clerk

Request denied: July 24, 2002

GRC Complaint filed: August 29, 2002

Current Custodian of 911 tape: Middlesex County Prosecutor's Office

In apparent response to the January 7, 2003 Amended Finding and Recommendation in this matter, on January 13, 2003, Middlesex County First Assistant Prosecutor William Lamb filed a motion with the Honorable Frederick DeVesa, the Presiding Judge of the Middlesex County Criminal Court, seeking an order precluding any party to the criminal case from disclosing the content of the 911 tape made by Michael Janicki on July 16, 2002. The order would also extend to the Township Police (and the Township Records Custodian) as "agents of the prosecution." This was consistent with the Director's Finding and Recommendation that suggested the Prosecutor apply for just such an order from the criminal court.

The Prosecutor invoked the court's broad judicial power and duty "to safeguard the fair administration of justice" and argued that the 911 tape must be kept confidential to ensure an impartial jury and a fair trial. The prosecutor argued also that the 911 tape was a criminal investigatory record, and thus not a government record subject to disclosure under OPRA. The Prosecutor further argued that even if it was disclosable, the tape was not accessible under N.J.S.A. 47:1A-3(a) because it was made at 11:15 p.m. and never "open for inspection" at government offices prior to commencement of the police investigation at 2:25 a.m. The Prosecutor also complained that his office was not a "party" to the GRC Complaint.

The Home News Tribune moved to intervene in the matter and opposed the motion as an unjustifiable restraint on the newspaper's first amendment rights, lacking any compelling reason.

The parties argued the motion before Judge DeVesa on January 15, 2003. At the Court's invitation, the Executive Director submitted a letter outlining the role of the Council along with a copy of the Preliminary Finding and Recommendation. That letter indicated, consistent with the Draft Amended Finding and Recommendation (January 7), that the matter would remain on the Council's agenda, but indicated that if the Council voted to grant access to the tape, the effective date of the order would be stayed for 30 days, or longer if necessary, in order for the Court to conclude its consideration,

On January 16, 2003, Judge DeVesa listened to the 911 tape *in camera* and denied the motion for the protective order because release of the tape would **not** compromise the parties' constitutional right to a fair trial. However, the Judge placed on the record his concerns regarding accessibility of 911 calls under OPRA and asked the Council to consider his remarks before it ruled on the matter. A transcript of the matter was provided to the Council prior to the start of its meeting on January 17, 2002.

It is important to note that Janicki's attorney, William Fetky, was present for the motion and has also been copied on the Director's Findings recommending release of the tape. At no point has Mr. Fetky indicated to the Prosecutor, the GRC or Judge DeVesa that his client, who made the 911 call, has any objection to release of the content of tape to the Home News Tribune.

In denying the prosecutor's motion, Judge DeVesa stated that, in his opinion:

1. The GRC did not have authority under OPRA to order access to the 911 call while a criminal prosecution was pending;
2. The GRC did not have the authority to order the Prosecutor to provide access to a tape in a GRC proceeding in which the prosecutor was not formally designated a "party";
3. 911 tapes were never intended to be "permanent" records and, as such, should not be considered "government records" under OPRA;
4. The 911 call in this matter should be treated as confidential criminal investigatory record under OPRA because it was being used as part of an on-going criminal investigation;
5. The 911 tape was not "open for inspection" under N.J.S.A. 47:1A-3(a) because the police investigation began before municipal offices opened the following morning; that 911 tapes are not intended to be preserved permanently and, thus, should not be accessible under OPRA merely because this tape was preserved by the police for a murder investigation (similar to an argument made by the Prosecutor).

The Executive Director has reviewed the portion of the transcript containing the judge's ruling on the motion and the judge's observations regarding OPRA and makes the following findings and recommendations as a supplement to those contained in the Finding and Recommendation of January 13, 2003:

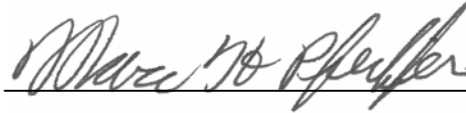
1. The Council may consider the Complaint in this matter because the tape has not been kept "confidential" by Court Order; N.J.S.A. 47:1A-1.1;
2. The Judge's opinions concerning interpretation of OPRA or the Council's jurisdiction may be considered by the Council but are not, in any way whatsoever, binding upon the Council;
3. That the Prosecutor has been and should continue to be treated as a full party to this GRC complaint, with full access and opportunity to comment on proceedings in the Serrano case before the Council and any appellate court;
4. The plain language of OPRA does not support the Judge's argument that 911 tapes are confidential under OPRA: 911 tapes are required to be recorded and maintained by law; "criminal investigatory records" are records that "are *not* required by law to be made, maintained or kept on file..." Thus, 911 tapes are *not* criminal investigatory records deemed confidential under OPRA;
5. Judge DeVesa provided the Council no legal authority in support of the proposition that the Legislature did "not intend" to treat 911 tapes as "government records" accessible to the public under OPRA or intend the Council to adjudicate complaints for access a government

records that are part of an investigation by a public agency. There is no legal authority known to the Executive Director which supports these propositions;

6. OPRA does not define a "government record" by the time periods in which the public can access public buildings; or by the time of day a record is created, nor does it classify records confidential merely because they are created during hours when government buildings are closed to the public.

Thus, when N.J.S.A. 47:1A-3(a) assures post-investigation access to records which were "open for inspection, examination or copying" *prior to* commencement of an investigation, the intention is to preserve access to those records meeting the definition of "government records" under OPRA. The 911 tape in this case is a government record accessible to the public after commencement of an investigation under N.J.S.A. 47:1A-3(a) because the tape was "open for investigation, inspection or copying" as a matter of law upon creation, and the record existed prior to the commencement of the police investigation several hours later.

7. The OPRA request in this matter was made to the Township at the time the Township had custody of the 911 tape. Anticipating that records are exchanged between public agencies, OPRA provides that the current custodian must provide the previous custodian "sufficient access" to a government record to allow the former custodian to respond to an OPRA request.
8. This recommendation would not prejudice any custodian's claim of confidentiality with respect to a different 911 tape under other circumstances, if supported by a specific OPRA exception.



Marc H. Pfeiffer, Acting Executive Director
Government Records Council

Dated: January 17, 2003